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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1855

PAUL W. MILHOUSE and EWING T. WAYLAND,

Being Those Persons Upon Whom Service of Process Was Attempted on Behalf of THE UNITED METHODIST CHURCH, A Named Defendant Below,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA,

Respondent,

and

CHARLES W. TRIGG, *et al.*,

Real Parties in Interest.

MOTION OF THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE UNITED STATES OF AMERICA FOR LEAVE TO APPEAR AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI AND BRIEF CONDITIONALLY FILED IN SUPPORT THEREOF

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PLEASE TAKE NOTICE that, pursuant to Rule 42 of the Rules of this Court, the National Council of the Churches of Christ in the United States of America hereby moves for

leave to appear and file a brief, a copy of which is conditionally annexed hereto, as *amicus curiae* in support of the Petition for a Writ of Certiorari filed by Petitioners Paul W. Milhouse and Ewing T. Wayland, being those persons upon whom service of process was attempted on behalf of The United Methodist Church, a named defendant in the underlying action.

The interest of The National Council of the Churches of Christ in the United States of America ("the National Council") in the Petition for a Writ of Certiorari arises from its concern for the constitutionally guaranteed freedom of each of its member denominations to establish, maintain and define its own internal structural organization as a matter of ecclesiastical polity and doctrinal interpretation, free from state interference.

The National Council seeks to appear as an *amicus curiae* to present additional argument on the following points:

1. The impact on the free exercise of religion by other denominations and the Christian Church as a whole by the decision below.
2. The constitutionally impermissible entanglement of the courts in the church polities of other denominations which will result from application of the test for suability of denominations adopted below.
3. In view of the grave First Amendment problems presented by the decision below, it can only be sustained upon a threshold finding, not made below, of a clear expression on the part of the drafters of

Rule 17(b), Fed. R. Civ. P., of the intention to include religious denominations within the term "unincorporated association" as used therein, or an equally clear expression by the California Legislature of its intention to include religious denominations within the term "unincorporated association" in enacting Section 388 of the Code of Civil Procedure. As observed by this Court in *National Labor Relations Board* v. *The Catholic Bishop of Chicago*, —— U.S. ——, at ——, 99 S. Ct. 1313, at 1322 (1979):

"[I]n the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the [National Labor Relations] Board, we decline to construe the [National Labor Relations] Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses."

The National Council is incorporated under the Not-For-Profit Corporation Law of the State of New York. As stated in the Preamble to its Constitution, the National Council "is a cooperative agency of Christian communions seeking to fulfill the unity and mission to which God calls them." Its member communions total thirty-one Protestant and Orthodox religious denominations with an aggregate membership of 42,000,000 individuals throughout the United States. The National Council is organized exclusively for religious purposes. By its certificate of incor-

poration it is committed "to promote the application of the law of Christ in every relation of life."

Respectfully submitted,

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To: Office of the Clerk
Supreme Court of the United States

All Counsel Listed on the Annexed Affidavit of Service*

* Counsel for petitioners, Witwer, Moran, Burlage & Atkinson, have consented to this motion, pursuant to a letter which has been filed with the Clerk of this Court. The consent of counsel for respondents was requested but refused.

IN THE

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Interest of *Amicus Curiae*

The interest of The National Council of the Churches of Christ in the United States of America ("the National Council") in the Petition for a Writ of Certiorari filed by those persons upon whom service of process was attempted on behalf of the United Methodist Church, a named defendant, arises from its concern for the constitutionally guaranteed freedom of each of its member denominations to establish, maintain and define its own internal structural organization as a matter of ecclesiastical polity and doctrinal interpretation, free from state interference.

This brief is being conditionally filed with and in support of the motion of the National Council for leave to appear as *amicus curiae* herein. The National Council seeks to appear as an *amicus curiae* to present additional argument on the following points:

1. The impact on the free exercise of religion by other denominations and the Christian Church as a whole by the decision below.
2. The constitutionally impermissible entanglement of the courts in the church polities of other denominations which will result from application of the test for suability of denominations adopted below.
3. In view of the grave First Amendment problems presented by the decision below, it can only be sustained upon a threshold finding, not made below, of a clear expression on the part of the drafters of Rule 17(b), Fed. R. Civ. P., of the intention to include religious denominations within the term "unincorporated association" as used therein, or an equally clear expression by the California Legislature of its intention to include religious denominations within the term "unincorporated association" in enacting Section 388 of the Code of Civil Procedure. As observed by this Court in *National Labor Relations Board* v. *The Catholic Bishop of Chicago*, —— U.S. ——, at ——, 99 S. Ct. 1313, at 1322 (1970):

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Statement of the Case

The circumstances of the present litigation, as well as the opinions below, the jurisdiction of this Court and the federal constitutional provisions and rule involved, are set forth in the Petition for a Writ of Certiorari (hereinafter referred to as "the Petition") and need not be repeated at length here. In addition, California Code of Civil Procedure § 388 (West 1973) provides in pertinent part:

> "(a) Any partnership or other unincorporated association, whether organized for profit or not, may sue and be sued in the name which it has assumed or by which it is known."

California Corporation Code § 24000 (West 1977) provides in pertinent part:

> "(a) As used in this part 'unincorporated association' means any partnership or other unincorporated organization of two or more persons, whether organized for profit or not, but does not include a government or governmental subdivision or agency."

On August 15, 1978, the United States District Court for the Southern District of California issued an oral opinion (a transcript of which is included as Appendix C to the Petition) denying petitioners' motion to dismiss the named defendant the United Methodist Church ("UMC") for lack of jurisdiction over the person and for insufficiency of service of process pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(5), respectively.* The District Court erroneously accepted respondents' unsupported assertion that the UMC "is sueable as an unincorporated association, namely a hierarchical, jural entity . . ." (Transcript, Appendix to the Petition, Appendix C at A-9). In reaching that conclusion, the District Court unconstitutionally substituted its own view of the UMC organization, including its own construction of the UMC Book of Discipline, for the authoritative and unanimous testimony of ecclesiastical experts. Thereafter, the Court of Appeals for the Ninth Circuit denied mandamus to review and its denial is now before this Court.

* Petitioners thereupon orally requested, and the District Court orally denied, certification of the order pursuant to 28 U.S.C. § 1292 (b). The formal order denying petitioners' motion to dismiss was entered on August 23, 1978, and by order dated September 6, 1978 the District Court denied petitioners' motion for reconsideration of its refusal to certify the question.

Summary of Argument

The position of the National Council may be simply stated: the District Court's decision that the unincorporated denomination referred to as "The United Methodist Church" is a jural entity or unincorporated association subject to suit is clearly erroneous in that it utterly fails to extend the deference to religious authorities which the Constitution requires in all matters of essentially religious or theological concern. Failure to reverse the constitutional error committed by the District Court

(1) would unconstitutionally abridge the free exercise of religion, for it would necessarily force all religious denominations to re-examine and reorganize their internal church polities in light of the unprecedented potential for civil liability arising from the activities of a local or affiliated unit;

(2) would lead to the unconstitutional preference of some denominations over others by reason of almost in-

evitable holdings that some relatively closely organized denominations (*e.g.*, the Roman Catholic Church) are suable entities while relatively loosely organized denominations (*e.g.*, the Baptists) are not;

(3) would result in the gross intrusion and entanglement of the courts in church doctrine and polity of other denominations against which actions will undoubtedly be atttempted for the real or imagined wrongs done claimants by local parishes or congregations, hospitals or nursing homes, in direct contravention of this Court's consistent view that, under the First Amendment, "civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." *Jones* v. *Wolf*, —— U.S. ——, 99 S. Ct. 3020, 3025 (1979); and

(4) would improperly require this Court to resolve the foregoing difficult First Amendment questions in the absence of a clear expression of intent, under either Rule 17(b), Fed. R. Civ. P., or Section 388 of the California Code of Civil Procedure, to include religious denominations within the term "unincorporated association."

The freedoms of religion from State interference contained in the First Amendment have long been construed to compel judicial deference to ecclesiastical authorities in all controversies involving issues of faith, dogma and church governance. The internal structures, or polities, of the various Christian denominations in the United States and throughout the world do not reflect mere decisions of style or administrative convenience, but rather embody distinctive and fundamental principles of theological belief.

Consequently, State revision or misinterpretation of church polity would violate the Constitution no less than would a rewriting or censorship of the underlying tenets of Christian faith.

In the instant case respondents have persuaded the District Court to impose a judicially-created associational cohesiveness upon the UMC and its member congregations in the face of unanimous and uncontradicted ecclesiastical authority establishing that these congregations form only a loosely related "connectional" polity with no central authority controlling their spiritual or temporal affairs. Although there are religious units within or affiliated with the UMC which are incorporated and may therefore exist as *suable* jural entities, including the named defendant corporations General Council on Finance and Administration of the United Methodist Church ("GCFA") and the Pacific and Southwest Annual Conference of the United Methodist Church ("PSWAC"), the District Court's characterization of the United Methodist denomination itself as such an entity, particularly in the face of uncontradicted and authoritative theological testimony to the contrary, plainly violates fundamental Constitutional guarantees and subjects *all* denominations to the danger of judicial revision of religious organizational principles. The District Court's order must be promptly reversed.

ARGUMENT

POINT I

The First Amendment requires judicial deference to church construction of ecclesiastical matters.

It has long been established that the First Amendment forbids governmental interference with, or revision of, a religious denomination's resolution of ecclesiastical issues. The core meaning of the constitutional guarantees of religious freedom, contained in the "Establishment" and "Free Exercise" clauses of the First Amendment, is "that we will not tolerate either governmentally established religion or governmental interference with religion." *Walz* v. *Tax Commission,* 397 U.S. 664, 669 (1970). In order to give practical effect to these constitutional guarantees, this Court has established under the First and the Fourteenth Amendments* "the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them." *Serbian Eastern Orthodox Diocese for the United States of America* v. *Milivojevich,* 426 U.S. 696, 713 (1976).

This fundamental constitutional principle requiring judicial deference to church interpretation of doctrinal issues has been invoked most frequently in cases developing out of denominational schisms, such as disputes involving church property, *see, e.g., Maryland and Virginia Eldership*

* The guarantees of religious freedom established by the First Amendment are undisputedly made applicable to the states by the Fourteenth. *McGowan* v. *Maryland,* 366 U.S. 420, 429 (1961); *Cantwell* v. *Connecticut,* 310 U.S. 296, 303 (1940).

of the Churches of God. v. *Church of God at Sharpsburg, Inc.,* 396 U.S. 367 (1970) (*per curiam*); *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 449-53 (1969); *Kreshik* v. *St. Nicholas Cathedral of the Russian Orthodox Church of North America,* 363 U.S. 190 (1960) (*per curiam*); *Watson* v. *Jones,* 80 U.S. (13 Wall.) 679, 727-29, 732-35 (1872)*; *cf. Kedroff* v. *St. Nicholas Cathedral of the Russian Orthodox Church in North America,* 344 U.S. 94 (1952) (legislative interference), or those involving alleged entitlement to church positions, *see, e.g., Serbian Orthodox Diocese, supra,* 426 U.S. at 708-720; *Gonzales* v. *Roman Catholic Archbishop of Manila,* 280 U.S. 1 (1929).

Nevertheless, the constitutional prohibition against judicial interference with matters of church law and governance is not restricted in its application to intra-denominational disputes over church property or position. Although it is admittedly disputes of that nature which are most likely to generate religious controversies, it is the fact that doctrinal issues are raised, not the mere procedural circumstance that the dispute is intra-church, which compels judicial deference to authoritative ecclesiastical sources. Whether the specific formal contentions involve property, title or governance, "[w]hat is at stake [in such cases] is the power to exercise eligious authority," *Ked-*

* *Watson* v. *Jones,* 80 U.S. (13 Wall.) 679 (1872) was a diversity action decided before the application of the First Amendment to the states and also before *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938). Although it consequently constituted a statement of general federal law, its language has been recognized as having "a clear constitutional ring." *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 446 (1969); *accord, Serbian Eastern Orthodox Diocese for the United States of America* v. *Milivojevich,* 426 U.S. 696, 710 (1976).

roff v. *St. Nicholas Cathedral, supra,* 344 U.S. at 121 (Frankfurter, J., concurring). Consequently, whenever essential religious identities or principles are at stake, in whatever context the exercise of religious authority or doctrinal interpretation is placed in issue, "the First Amendment requires that the [civil] courts give deference to the [church's] determination of that church's identity [or polity]." *Jones* v. *Wolf, supra,* 99 S. Ct. at 3028 (footnote omitted). The fact that the instant action involves a claim alleged by a third party against a religious denomination does not alter this fundamental constitutional principle *insofar as issues of faith or doctrine* are raised. As discussed in Point II, *infra,* the question of church organization at issue in this case is clearly one which is an essential and inextricable part of core doctrinal concerns.

In this respect, the order and opinion issued by Mr. Justice Rehnquist as Circuit Justice in a related proceeding is entirely inapposite. In that order Justice Rehnquist denied the emergency application of the General Council on Finance and Administration of the United Methodist Church ("GCFA") for a stay of all proceedings pending Supreme Court resolution of GCFA's petition for certiorari. *General Council on Finance and Administration of the United Methodist Church* v. *Superior Court of California,* —— U.S. ——, 99 S. Ct. 35 (1978). In its petition GCFA contended that the trial court had erroneously asserted "long-arm" personal jurisdiction over it by misconstruing the functions it performed on behalf of the United Methodist Church. GCFA, concededly an Illinois not-for-profit corporation which administers a small percentage of the total donations received by local United

Methodist churches, did not dispute its own jural status as a suable entity. In rejecting GCFA's jurisdictional argument, Justice Rehnquist concluded that the lower court's rationale was not "entirely clear, ' and that its grounds for decision may not have included "its interpretation of Methodist polity." 99 S. Ct. at 38.

Alternatively, Justice Rehnquist stated his own view to be that First Amendment protections against judicial interference with "matters of ecclesiastical cognizance and polity" may not "apply outside the context of [intra-church] disputes." *Id.* His language makes clear that his reluctance to apply the established principle of non-interference to third-party disputes would be based on his perception of such third-party disputes as "purely secular" and not involving "essentially religious controversies." *Id.* Without expressing any view as to the applicability of these criteria to the corporate defendant GCFA, the National Council of Churches vigorously contends in Point II, *infra,* that the polity of an international religious denomination such as the United Methodist Church, or of the relatively structured Roman Catholic Church as opposed to the relatively unstructured Religious Society of Friends, is precisely such as "essentially religious controversy," not a secular matter subject to civil court resolution.

Finally, to the extent that Justice Rehnquist's decision may be read to propose that civil courts be constitutionally permitted to evaluate doctrinal law and polity independent of authoritative church interpretation, it is respectfully submitted that this position was substantially expressed in his dissent, and rejected by the Court, in *Serbian Orthodox Diocese, supra.*

POINT II

Church interpretation of polity and governance is a theological consideration with which civil courts may not interfere.

Issues of internal church organization and authority constitute essential matters of religious belief, and the lower court's refusal to follow established church interpretation of church polity was constitutionally defective and must be remedied without delay. When presented with unanimous theological authority concerning an issue of denominational polity, as were the lower courts, a civil court is forbidden to substitute its own reading of church organization for that of the pertinent ecclesiastical authorities. The contrary decision by the lower courts constitutes a gross breach of Jefferson's Wall of Separation by asserting the competence and authority of the civil judiciary to decide the age-old issues over which the Wars of the Reformation were fought, issues which divided Protestant from Pope but also divided John Calvin from Martin Luther, John Wesley from Calvin, George Fox and the Quakers from the Church of England.

This Court expressly recognizes that the constitutional protection against state interference with ecclesiastical principles and beliefs, discussed in Point I, *supra,* extends to issues of denominational organization, administration and self-government. As held recently in *Serbian Orthodox Diocese, supra,* "This principle [of avoiding civil interpretation of religious doctrine] applies with equal force to church disputes over church polity and church administration." 426 U.S. at 710. *See also Kedroff* v. *St. Nicholas Cathedral, supra,* 344 U.S. at 116. Supporting this rule, of course, is the Court's recognition that matters of internal church "polity" embody essential principles of religious faith and dogma.* Kauper, *Church Autonomy and the First Amendment—The Presbyterian Church Case,* 1969 Sup. Ct. Rev. 347, 352-55 [hereinafter cited as *Church Autonomy*]; Note, *Judicial Intervention in Church Property Disputes—Some Constitutional Considerations,* 74 Yale L.J. 1113, 1132 *et seq.* (1965); Note, *Judicial Intervention in Disputes Over the Use of Church Property,* 75 Harv. L. Rev. 1142, 1158-1160 (1962).

Justice Brennan, the author of the opinion of the Court in *Serbian Orthodox Diocese,* had previously summarized the constitutional danger of judicial interference with or revision of a denomination's interpretation of its own polity in *Md. & Va. Churches* v. *Sharpsburg Church, supra*:

> "To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determination of religious doctrine. Similarly, where the identity of the governing body or bodies that exercise general authority within a church is a matter of substantial controversy, civil courts are not to make the inquiry into religious law and usage that would be essential to the resolution of the controversy."

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* "Polity refers to the general governmental structure of a church and the organs of authority defined by its own organic law." Kauper, *Church Autonomy and the First Amendment—The Presbyterian Church Case,* 1969 Sup. Ct. Rev. 347, 352-53 (footnote omitted); *see generally* Schaver, *The Polity of the Churches* (1947).

396 U.S. at 369-70 (concurring opinion) (footnote omitted), cited with approval in *Serbian Orthodox Diocese*, 426 U.S. at 723. For purposes of illustration, two examples of the many denominations in the United States make absolutely clear that the churches' respective polities constitute the outward manifestations of innermost principles of religious faith, and that their fundamental, and constitutionally protected, doctrinal differences are reflected in their equally well-established, and equally protected, organizational differences.

The courts have tended to identify two general but imprecise classifications of church polities: the congregational and the hierarchical. *See, e.g., Md. & Va. Churches* v. *Sharpsburg Church, supra*, 396 U.S. at 369 n. 1 (Brennan, J., concurring).* In the congregational form, each local church congregation is essentially self-governing, independent of ecclesiastical supervision, and autonomous in all matters of doctrine, liturgy and governance. *Watson* v. *Jones, supra*, 80 U.S. at 722, 724-26 (dictum); *Bouldin* v. *Alexander*, 82 U.S. (15 Wall.) 131 (1872); Schaver, *The Polity of the Churches*, 43-44 (1947) [hereinafter *Polity*]; Mead, *Handbook of Denominations in the United States*, 214-18, 242, (1965) [hereinafter *Denominations*]. Among the denominations adhering to this congregational polity are the various Baptist Churches. Central to the Baptists' fundamental theological creed is "the inherent freedom of the individual to approach God for himself," *Denominations* at 35, and consequently "[the Baptists] have insisted

* Although the "congregational/hierarchical" dichotomy distinguishes broadly among polities on the basis of relative concentration or dispersion of authority, it does not, and is not intended to, describe with particularity the wide variety of denominational organizations existing in the United States. *See* discussion at Point III, *infra*.

too upon the absolute autonomy of the local congregation [and] each church arranges its own worship, examines and baptizes its own members." *Id.* Thus the individual's doctrinal freedom to communicate directly and independently with God is reflected in each congregation's freedom from organizational supervision or restraint.

By contrast, in a hierarchical polity the local congregation is a unit of, and subordinate to, a larger organization consisting of ascending positions of ecclesiastical authority. *See, e.g., Serbian Orthodox Diocese, supra*, 426 U.S. at 715 and n. 9; *Presbyterian Church* v. *Hull Church, supra*, 393 U.S. at 441-442. The hierarchical category may be further subdivided into the episcopal polity, in which the various levels of authority rest in the hands of individual clerical officers, such as bishops, and the presbyterial, or synodical, polity, in which authority vests in a hierarchy of representative assemblies of laymen and clerics. *Church Autonomy* at 354-55; Note, *supra*, 75 Harv. L. Rev. at 1143-44. The hierarchical polities of the episcopal form, including that of the Roman Catholic Church, for example, focus all authority in an individual clerical superior who delegates responsibilities to inferior clerics and assemblies.

The Pope is the spiritual and governmental head of the Roman Catholic Church, the supreme authority in all issues of religious faith and church administration. The authoritarian hierarchical polity thus gives tangible shape to the doctrinal belief, central to the Roman Catholic faith, that the Pope is the lineal successor to the authority bestowed by Christ upon his apostle Peter. As proclaimed in the 1964 National Catholic Almanac's summary of Catholic

belief, "[Christ] founded the church on a rock of infallibility and invincibility. . . . [Church] members profess one pastor (the Pope), the successor to St. Peter, to whom Christ committed his whole flock." *Denominations* at 196. From this fundamental religious tenet is derived the rigidly authoritarian polity of the church, including the central principle that papal declarations *ex cathedra* are doctrinally infallible and final on issues of faith. *See Polity* at 22-23. The Roman Catholic belief in the "organic unity of Christ, 'the fullness of the godhead bodily,' with the church 'which is his body' is the essence of Catholic ecclesiology. . . . 'By the very fact of being a body,' said [Pope] Leo XIII, 'the church is visible.' Its existence, institution, and operation are therefore sacramental." 19 Encyclopedia Britannica 464 (1972 ed.).

The foregoing summary of the parallelism between theological doctrine and denominational polity makes clear that, as expressly recognized by this Court, matters of church polity and organization reflect fundamental religious tenets. It is this demonstrable condition which explains the rule of judicial deference in matters of church organization, *Serbian Orthodox Diocese, supra,* since "civil courts in identifying a church's polity for legal purposes are necessarily at the same time passing on an important ecclesiastical question respecting the nature of the church and its authority." *Church Autonomy* at 371; *see, e.g., St. John Chrysostom Greek Catholic Church of Pittsburgh* v. *Elko,* 259 A.2d 419 (Pa. 1969).

Consequently, in order to avoid constitutionally proscribed interference with ecclesiastical concerns, to the

extent a civil court is faced with the responsibility of applying a rule or a statute such as the California's Code definition of an "unincorporated association" to the internal structure of a particular denomination it must (a) determine whether the Legislature intended to include church associations in the suable entities thus defined, *N.L.R.B.* v. *Catholic Bishop of Chicago, supra,* 99 S. Ct. 1313, and, only after making such determination, (b) defer to that denomination's own authoritative construction of church polity, for "lines of authority within polities are apt to be blurred, and the relevant church law chaotic, voluminous, and unintelligible to a court." Note, *supra,* 75 Harv. L. Rev. at 1160 (footnote omitted). *See Serbian Orthodox Diocese, supra,* 426 U.S. at 699 (sources of ecclesiastical law termed "ambiguous and seemingly inconsistent"). Such authoritative constructions may be located in the church's constitutional documents, *see, e.g., Serbian Orthodox Diocese, supra,* 426 U.S. at 715-17 and n. 9; they may be provided by expert canonical witnesses within the church, *id.,* at 718; and they can be confirmed by religious authorities in general. *See Wisconsin* v. *Yoder,* 406 U.S. 205, 209 *et seq.* (1972); *cf. Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. at 125 (Frankfurter, J. concurring).

In this context, it is plain that the opinion below is gravely erroneous. Nothing whatever has been adduced to suggest that the drafters of Rule 17(b), Fed. R. Civ. P., or the California Legislature intended to include church denominations among the unincorporated associations rendered suable in derogation of the common law. *N.L.R.B.* v. *Catholic Bishop of Chicago, supra.* Nor is this a case

in which a court, faced with conflicting interpretations of denominational polity offered by differing theologians, was required to credit one construction as authoritative over another. In this action extensive and unanimous ecclesiastical proof was introduced before the trial court demonstrating that the polity of the UMC is a unique "connectionalism" consisting of largely autonomous local churches connected through nonauthoritarian conferences. Nevertheless, the lower court contradicted the undisputed expert testimony presented by church authorities concerning the UMC's decentralized polity; it imposed another vision of United Methodism which is unsupported by expert religious testimony and thereby characterized the UMC as an authoritarian, hierarchical organization; and it consequently concluded that the church demonstrates sufficient organizational cohesiveness to constitute a jural entity with the capacity to be sued. As is plainly established by the above-cited authorities, such judicial conduct constitutes a fundamental violation of the constitutional principle of avoiding state interference with ecclesiastical questions and must be reversed.

POINT III

The impact of a failure to reverse: judicial contradiction of unanimous church authorities on issues of internal polity would result in the unconstitutional preference of one form of polity over another and would force all religious denominations to revise theologically-based polity to conform to secular standards.

The National Council submits that it is absolutely clear that civil contradiction of unanimous church authority on matters of internal administration and polity, as erroneously effected by the lower court, would effectively restructure the workings of any church at the expense of substantive doctrinal beliefs and of due process.*

Moreover, it is of course established that the First Amendment guarantees that the State cannot "prefer one religion over another," *Everson* v. *Board of Educ.*, 330

* In the case of UMC, this result would impose an entirely artificial and unsupportable organizational structure upon what had authoritatively been considered to be a loosely assembled "connectional" polity. Independent member congregations which had never intended to be, and had never been, accountable for the acts of each other or of the United Methodist denomination itself, would be claimed to be vulnerable to the execution of any judgment which might be entered against the UMC.

Petitioners have made a showing that the UMC denomination does not itself own property or enter into contracts, and that there are *no* "common assets" other than those held by United Methodist units such as GCFA and PSWAC or by individual United Methodist member congregations. GCFA and PSWAC are named as defendants and are concededly jural entities for purposes of suit. Consequently, respondents' attempt to include "the United Methodist Church" as an additional party can only amount to an effort to reach the assets and real property of the 43,000 individual member churches throughout the United States through a judicial reconstruction of United Methodist polity. Further discussion of the polity of United Methodism may be properly left with petitioners.

U.S. 1, 15 (1947), whether by explicitly favorable or unfavorable treatment or by indirect coercive pressure. *Engel* v. *Vitale*, 370 U.S. 421, 431 (1962); *Braunfeld* v. *Brown*, 366 U.S. 599, 607 (1961). The opinion below unmistakeably suggests that the lower court has determined to permit civil suit against the UMC, due to what the court deemed to be its hierarchical polity and without its consent, while it would deny the capacity of another to be sued because of its congregational or de-centralized polity. Should courts continue to intrude similarly into this issue, they will thereby create an unconstitutional distinction, for "then those who embrace one religious faith rather than another would be subject to penalties; and that kind of discrimination . . . would violate the Free Exercise Clause." *United States* v. *Seeger*, 380 U.S. 163, 188 (1965) (Douglas, J. concurring).

Failure to correct the lower court's unconstitutional judicial revision of church organization in contradiction of church authorities would in turn inevitably force the widespread reorganization of denominational polities into alien and doctrinally meaningless patterns. These reorganizations would be compelled solely in order to avoid the previously unintended, unforeseen, and unprecedented imposition of civil responsibility for the acts of any local or affiliated unit. The First Amendment forbids this result.

Consideration of a small sample of the 223 religious bodies most recently reported in the United States* illus-

* *Yearbook of American and Canadian Churches 1978*, pp. 217-224 (Jacquet ed.) (published by the National Council of Churches). These widely diverse denominations include more than 130,000,000 individual members and over 333,000 separate churches. *Id.*, at 224.

strates the rich diversity of church polities presently enjoyed in this country and graphically demonstrates the potential for chaos contained in the lower court's acceptance of respondents' call for judicially compelled revision of religious organizations.

A. The Roman Catholic Church

The Roman Catholic Church, noted in Point II, *supra*, to be organized in an hierarchical polity of the episcopal form, is the largest single denomination of Christians in the United States with approximately 50,000,000 members. *The Official Catholic Directory for 1977*, cited in *Yearbook of American and Canadian Churches, 1978*, pp. 80, 222 (Jacquet ed.) [hereinafter cited as *1978 Yearbook*]. The central authority in Rome, including the Pope, the Episcopal College and the Roman Curia, exercises world-wide jurisdiction over the local divisions or ordinaries of the Church, which in the United States consist of 135 dioceses and 32 archidioceses normally headed by bishops and archbishops, respectively. *Id.*, at 252. Groups of dioceses form ecclesiastical provinces, and the diocesan heads periodically meet in the form of provincial councils. 19 *Encyclopedia Britannica* 468 (1972 ed.) [hereinafter cited only by volume and page]. The individual diocese is divided into parishes, presided over by pastors, and in 1977 there existed 17,872 parishes with resident pastors and 700 without resident clergy. *1978 Yearbook* at 252. There is no intermediate level of authority between the global authority of the Pope and the local diocesan authority of the bishops, and consequently there is no authority on the *national* level that is responsible for governing the church in the United States. In fact, when the bishops of the United States met perio-

dically to consider issues on a national basis, they initially called their meetings "the National Catholic Welfare Council" but changed the title to "the National Catholic Welfare Conference" at the insistence of the Vatican lest the word "Council" imply that the national aggregation of bishops had some kind of juridical authority or responsibility in the Church. The same is true of its successor body, "the National Conference of Catholic Bishops," and its implementative counterpart, the United States Catholic Conference, neither of which is a governing body of the Roman Catholic Church on a national basis.

A vast number and variety of organizations have been organized or sponsored by constituent units of the Church, including in this country alone more than 10,000 educational institutions and 700 hospitals fully equipped with clerical and lay workers, *id.*, as well as numerous organizations of recent origin designed to facilitate communications among bishops, priests and the laity, including more national councils, diocesan councils, parish councils and parochial school boards. 19 *Britannica* at 488. Although the Church is structured hierarchically, no one could contend seriously that the "Roman Catholic Church" is a suable entity which in itself is civilly answerable for all the activities of each of the subordinate or affiliated organizations, or whose world-wide assets would be subject to levy by an American or foreign court.

B. The Presbyterian Churches

The Presbyterian denomination in the United States similarly presents an hierarchical structure, but whereas the clergy in the Roman Catholic Church are ordained and are

considered to receive their authority from the Pope, the Presbyterian ministry are elected as representatives of the members. There are ten Presbyterian bodies in the United States, of which the two largest are the United Presbyterian Church in the U.S.A. and the Presbyterian Church in the United States, with an aggregate membership of approximately 3,500,000 in more than 12,000 local churches. *1978 Yearbook* at 222-223; 18 *Britannica* 464. As recognized by the Court in *Presbyterian Church* v. *Hull Church, supra,* 393 U.S. at 441-442, the Presbyterian polity consists of four general categories of church judicatories: (1) the session, which is comprised of the pastor and church elders on the local congregational level; (2) the presbytery, which is formed by equal numbers of ministers and lay elders of the churches within a given geographical area; (3) the synod, which is composed of a number of presbyteries; and (4) the General Assembly, which is composed of members elected by the presbyteries. *Denominations* at 178. In Presbyterian churches of American background the presbytery is regarded as the basic unit, 18 *Britannica* at 468, although there are various boards, commissions and councils formed at every level which formulate policy and administer projects in many different areas, including mission work abroad and in the United States; public health and urban development; and education. *Denominations* at 179. Education has been a particularly fruitful field, and among the institutions owing their origin to Presbyterian endeavors are Princeton University and the Union Theological Seminary in New York City. 18 *Britannica* 464-465. In all there are more than one thousand universities and secondary or elementary schools which are either maintained by or associated with the Program Agency of the

United Presbyterian Church in the U.S.A., along with over 200 hospitals and clinics. *Denominations* at 179. Numerous other church councils and boards participate in a variety of educational, health and housing projects. *Id.*; 18 *Britannica* 465.

C. The Society of Friends

Equally active in the community at large though maintaining dramatically different principles of doctrine and polity is the Society of Friends, commonly called Quakers. Approximately one hundred thousand Quakers today participate in the two major American Quaker bodies, the Society of Friends, or Friends United Meeting (formerly the Five Years Meeting of Friends) and the Religious Society of Friends, or Friends General Conference. *Denominations* at 117-118; *1978 Yearbook,* at 57-58, 220. The form of worship and fellowship is founded upon the belief in the priesthood of all believers; men and women share equally in worship and in church organization; no specific creed, prescribed liturgy or outward sacrament is established. *Denominations* at 116; 9 *Britannica* 938, 940-41. Quaker religious services are therefore without uniform practice, and they often depend on quiet meditation and prayer with spontaneous vocal contributions. Even business sessions await "the sense of the meeting" and may have "quiet times" during which unity is sought. *Denominations* at 116; 9 *Britannica* 939-940. The principle unit of church government is the monthly meeting, a body which usually meets once a month on all doctrinal and administrative matters. The quarterly meeting, comprised of between two and twelve monthly meetings, is primarily a deliberative body concerned with worship. Quarterly meetings in turn

are grouped to form yearly meetings, which are forty-five in number and are autonomous, although linked through the Friends World Committee for Consultation ("FWCC"). *Denominations* at 115-117; 9 *Britannica* 940. Despite their lack of any strict, corporation-like executive organization, the Quakers have traditionally been active in public affairs, particularly in the fields of international peace and relief work. The FWCC and the American Friends Service Committee cooperate to assist in the operations of the Economic and Social Council of the United Nations, *Denominations* at 117, and many other programs and publications of regional, national and international scope are administered by or assisted in some fashion by the Quakers. *Denominations* at 117; 9 *Britannica* 942.

D. The Baptist Churches

The largest Protestant community in the United States is composed of approximately 25,000,000 Baptists who participate in twenty-seven different bodies, the largest of which are the Southern Baptist Convention (13,000,000 members and 35,000 churches), the National Baptist Convention, U.S.A., Inc. (5,500,000 members and 26,000 churches), the National Baptist Convention of America (2,700,000 members and over 11,000 churches), and the American Baptist Churches in the U.S.A. (1,600,000 members and 6,000 churches). *1978 Yearbook* at 217, 221, 223; *Denominations* at 33 *et seq.*; 3 *Britannica* 139-40. As discussed in Point II, *supra,* these churches practice a strict form of congregational polity, maintaining the total autonomy of local congregations in the sense that each of these congregations is a manifestation of the whole Church of Christ and need not derive its authority from any other

source. 3 *Britannica* 142-143. The congregations are interrelated in cooperative bodies on the regional, state and national levels but surrender no authority to these larger bodies, which exist to implement the common concerns of the congregations. *Id.* at 142. These cooperative agencies and affiliates exist within each of the Baptist denominations, and they sponsor or are otherwise involved in a wide variety of educational, medical and missionary services in the United States and elsewhere. *Denominations* 34-42.

E. The Mennonite Churches

In sharp contrast are the beliefs of the Old Order Amish Church, a conservative body numbering 15,000 within the general ranks of the 200,000 Mennonites in the United States. *1978 Yearbook* at 221. As with many churches, classification of Mennonite polity is difficult: "the several bodies of Mennonites vary somewhat among themselves, and Mennonites do not fit well into a classification such as congregational, synodal, or episcopal; their polity has elements of all three." 15 *Britannica* 160; *see Denominations* at 143-147. The Old Amish congregations have no general organization, do not conduct conferences, and worship in private homes. *Denominations* at 146; *1978 Yearbook* at 71. As noted in *Wisconsin* v. *Yoder, supra,* 406 U.S. at 209-213, the Amish emphasize withdrawal from modern culture and technology based on their central belief that "salvation requires life in a church community . . . aloof from the world and its values." 406 U.S. at 210.

The foregoing sketch of the polities of several denominations, and the activities in which they or their affiliates are involved, gives an indication of the scope and doctrinal

complexity of the impact which would be created by failure to reverse the lower court. As already noted in the specific case of the Roman Catholic Church, *supra*, it simply cannot be seriously suggested that these denominations constitute suable entities whose national and international assets would be at risk whenever any internal unit or affiliated organization is named in a civil suit.

To permit civil courts to rewrite the laws of authority and responsibility of a church's polity, as the lower court would have done, would compel religious denominations in the future to consult with legal counsel regarding every aspect of their structure of worship. Religious denominations would be forced to retain counsel to rearrange time-honored and doctrinally-based polity in order to avoid the impositions of civil liability, much as commercial corporations must plan for and adjust to the tax or antitrust consequences of various forms of organization. Rather than follow organizational principles derived directly from substantive ecclesiastical doctrine, *see* Point II, *supra*, church authorities would have to revise their modes of worship into unprecedented structures which would be "at odds with fundamental tenets of their religious beliefs," *Wisconsin* v. *Yoder, supra,* 406 U.S. at 218. For example, in 1931 the Congregational Church and the Christian Church merged, and in 1961 they joined with the Evangelical and Reformed Church to form the United Church of Christ. As Congregational bodies, each had originally proclaimed belief in the "freedom and responsibility of the individual soul and the right of private judgment . . . [and held] to the autonomy of the local church and its independence of all ecclesiastical control." *Denominations* at 75. The merger was intended to institute no theological changes

and, as the resultant constitution makes clear, church polity continues to respect local independence: "The autonomy of the local church is inherent and modifiable only by its own action. Nothing . . . shall destroy or limit the right of each local church to continue to operate *in the way customary to it.*" *Id.*, at 220 (emphasis in original).

Respondents in this action would have the courts interfere with and inevitably prevent this unfettered exercise of religious belief and organization. The principle of judicial deference to ecclesiastical authorities on issues of church polity avoids this unconstitutional result, and the decision of the lower court must be reversed for its grave violation of this fundamental principle.

POINT IV

The implications of the lower court's acceptance of Respondents' overbroad definition of an "unincorporated association."

Respondents argued below that Rule 17(b), Fed. R. Civ. P., permits suit against the UMC and purported to rely on California Code of Civil Procedure § 388(a) and California Corporation Code § 24000 in support of their contention that UMC is a jural entity which may be subject to civil suit. However, § 388(a) provides only that any "unincorporated association . . . may sue and be sued . . ." and does not address the threshold issue of defining an "unincorporated association"; § 24000 simply states that an unincorporated association is an "organization of two or more persons . . . ."* Respondents asserted, and the lower court ap-

* *See* p. 8, *supra.*

parently concluded, without citation of authority, that an unincorporated association "is simply a group whose members share a common purpose and a common name."

The record before the lower courts contains uncontradicted expert evidence establishing that the only "common purpose" conceivably shared by members of the UMC is their worship of God in the Methodist fashion, and that their religious denomination has never exhibited the kind of quasi-corporate organization or activity which is the hallmark of the trade unions and other associations which previously constituted the kind of entity considered an "unincorporated association." *See, e.g., Georgia* v. *National Democratic Party*, 447 F.2d 1271 (D.C. Cir. 1971); *Juneau Spruce Corp.* v. *I. L. & W. Union*, 119 Cal. App. 2d 144, 259 P.2d 23 (1953).

Furthermore, the open-ended criteria proposed to define an unincorporated association are so broad as to be all inclusive. Brief consideration of even the most general religious categories further demonstrates the defectiveness of this proposed definition.

A. The Christian Church

The definition proposed by the respondents and accepted below would be equally applicable to an association comprised of all Christians in the United States, for such association would be a group whose members share a common purpose (activities furthering Christianity) and a common name (the Christian Church). The possibility of just such an application of this dangerously overbroad definition of "unincorporated association" is supported by Casad, *The*

Establishment Clause and the Ecumenical Movement, 62 Mich. L. Rev. 419, 423 (1964): "In this country we have tended to consider the Christian religion as being necessarily embodied in a varying number of denominational churches, but there is nothing absolute about this system . . . It is just as appropriate—perhaps more so—to regard the Christian religion as being embodied in one universal 'church,' with each denomination being viewed as a subdivision of that larger body." In fact, a standard definition of the word "church" is "the whole body of Christian believers; Christendom." The Random House Dictionary of the English Language 265 (1973 ed.).

B. Other Religions

Mention must also be made of non-Christian religions. American Judaism is comprised of three divisions, in all of which the local congregation enjoys full independence: 1) Orthodox Judaism, whose organizations include the Union of Orthodox Jewish Congregations of America, the Union of Orthodox Rabbis of the United States and Canada, the Rabbinical Alliance of America and the Rabbinical Council of America, Inc.; 2) Conservative Judaism, including as national organizations the United Synagogue of America and the Rabbinical Assembly; and 3) Reform Judaism, with the Union of American Hebrew Congregations and the Central Conference of American Rabbis. *1978 Yearbook* at 63; *Denominations* at 127. More than 6,000,000 American Jews today participate in thousands of local synagogues, many of which are not affiliated with national organizations, and in all three branches there are numerous organizations involved in education, religion, politics and community affairs, cultural events, social welfare, and Zionist or pro-Israel activities. *See generally The American Jewish Yearbook 1977* (Fine and Himmelfarb, eds.) (published by the American Jewish Committee), *cited in 1978 Yearbook* at 64.

Islamic religions would also constitute "an unincorporated association" under the criteria suggested by the respondents and accepted below. Two million Moslems in the United States today share Islamic beliefs and practice the same rituals in a wide variety of societies, organizations and mosques. *1978 Yearbook* at 68. In fact, all other religions in this country whose members share the common name of their faith and common spiritual beliefs would be similarly within the overbroad sweep of the proposed definition, and are therefore threatened by the lower court's effective revision of the internal organizational principles of the UMC.

Conclusion

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari must be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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